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From:

Sent: Thursday, June 18, 2009 1:29 PM

To:

Cc:

Subject: Tax Opinion Question

Thanks ,

I found the language on my own too, and I think your analysis is correct.

If I understand, you are asking whether your TP may rely on a legal opinion to exempt him from the 6662A penalty for tax years and , when you have determined that the reasonable cause defense would not otherwise apply because the opinion does not comply with the requirements of section 6664(d)(3)(B).

The special rule states that "Section 6664(d)(3)(B)...shall not apply to the opinion of a tax advisor if - (A) the opinion was provided to the taxpayer before the date of the enactment of this Act [10-22-2004], (B) the opinion relates to one or more transactions all of which were entered into before such date, and (C) the tax treatment of items relating to each such transaction was included on a return or statement filed by the taxpayer before such date." The only guidance I could find on the special rule is Notice 2005-12 (attached for your reference). The Notice does not discuss the special rule, but does indicate that we are drafting regulations to address this issue and have requested comments related to the special rule, specifically "disqualified opinions." I just spoke with the attorney assigned to these regs, and she does not know of any published guidance that addresses this issue either. She is looking into it, but based on the timeframe for this response, I told her that I would get back to you immediately and will follow up with you should she find something contrary to our plain language conclusion. Based on my research and discussion with her, I feel comfortable with your conclusion that that (C) must apply to the return at issue, otherwise the special rule would be redundant.

I understand that in your case (A) the opinion was provided before the enactment date and (B) the transaction was entered into before the enactment date; however, (C) the and returns were not filed by the taxpayer before the enactment date. Therefore, section 6664(d)(3)(B) applies to tax years and . If the opinion does not comply with the requirements of this section, the taxpayer may not benefit from the reasonable cause exception based on his reliance on this opinion.

Please let me know if this answers your question.

[Notice 2005-12, 2005-7 I.R.B. 494]